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ENVIRONMENTAL ASSESSMENT BOARD

VOLUME: 396

DATE: Thursday, September 24, 1992

BEFORE:

A. KOVEN Chairman

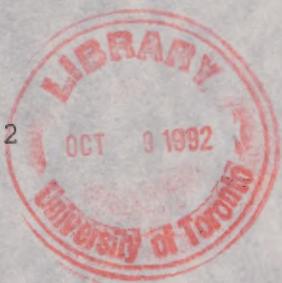
E. MARTEL Member

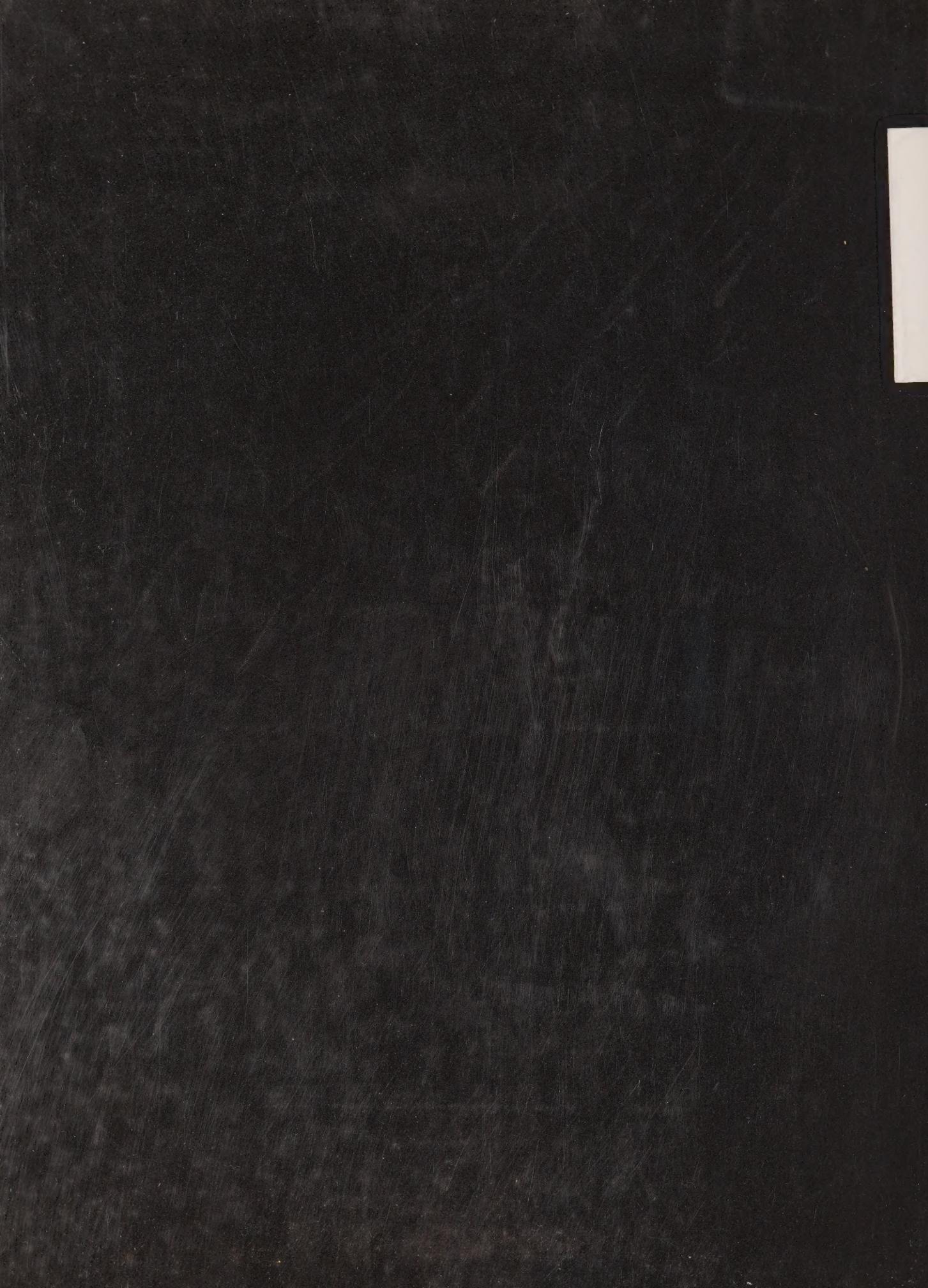
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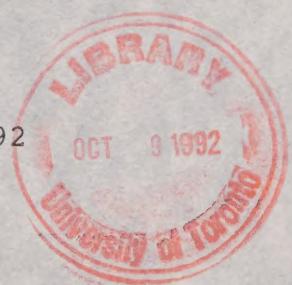
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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental Assessment for Timber Management on Crown Lands in Ontario;

- and -

IN THE MATTER of a Notice by The Honourable Jim Bradley, Minister of the Environment, requiring the Environmental Assessment Board to hold a hearing with respect to a Class Environmental Assessment (No. NR-AA-30) of an undertaking by the Ministry of Natural Resources for the activity of Timber Management on Crown Lands in Ontario.

Hearing held at the Ontario Highway Transport Board, 151 Bloor Street West, 10th Floor, Toronto, Ontario, on Thursday, September 24th, 1992, commencing at 11:00 a.m.

VOLUME 396

BEFORE:

MRS. ANNE KOVEN
MR. ELIE MARTEL

Chairman
Member

A P P E A R A N C E S

MR. V. FREIDIN, Q.C.	)	MINISTRY OF NATURAL
MS. C. BLASTORAH	)	RESOURCES
MS. K. MURPHY)	
MR. B. CAMPBELL)	
MS. J. SEABORN	)	MINISTRY OF ENVIRONMENT
MS. N. GILLESPIE)	
MR. R. TUER, Q.C.	)	ONTARIO FOREST INDUSTRY
MR. R. COSMAN	)	ASSOCIATION and ONTARIO
MS. E. CRONK	)	LUMBER MANUFACTURERS'
MR. P.R. CASSIDY	)	ASSOCIATION
MR. D. HUNT)	
MR. R. BERAM		ENVIRONMENTAL ASSESSMENT BOARD
MR. J.E. HANNA	)	ONTARIO FEDERATION
DR. T. QUINNEY	)	OF ANGLERS & HUNTERS
MR. D. O'LEARY		
MR. D. HUNTER	)	NISHNAWBE-ASKI NATION
MR. M. BAEDER	)	and WINDIGO TRIBAL COUNCIL
MS. M. SWENARCHUK	)	FORESTS FOR TOMORROW
MR. R. LINDGREN)	
MR. D. COLBORNE	)	GRAND COUNCIL TREATY #3
MR. G. KAKEWAY)	
MR. J. IRWIN		ONTARIO METIS & ABORIGINAL ASSOCIATION
MS. M. HALL		KIMBERLY-CLARK OF CANADA LIMITED and SPRUCE FALLS POWER & PAPER COMPANY

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MR. R. BARNES) ASSOCIATION
MR. P. ZYLBERBERG) NORTHWATCH COALITION
MS. B. LLOYD)
MR. J.W. ERICKSON, Q.C.)	RED LAKE-EAR FALLS JOINT
MR. B. BABCOCK	MUNICIPAL COMMITTEE
MR. D. SCOTT) NORTHWESTERN ONTARIO
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MR. S.M. MAKUCH	CANADIAN PACIFIC FOREST PRODUCTS LTD.
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MR. J. EBBS	FORESTERS ASSOCIATION
MR. D. KING	VENTURE TOURISM ASSOCIATION OF ONTARIO
MR. H. GRAHAM	CANADIAN INSTITUTE OF FORESTRY (CENTRAL ONTARIO SECTION)
MR. G.J. KINLIN	DEPARTMENT OF JUSTICE
MR. S.J. STEPINAC	MINISTRY OF NORTHERN DEVELOPMENT & MINES
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APPEARANCES (Cont'd):

MR. R.L. AXFORD	CANADIAN ASSOCIATION OF SINGLE INDUSTRY TOWNS
MR. M.O. EDWARDS	FORT FRANCES CHAMBER OF COMMERCE
MR. P.D. McCUTCHEON	GEORGE NIXON
MR. C. BRUNETTA	NORTHWESTERN ONTARIO TOURISM ASSOCIATION

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Submissions by Mr. Colborne 68006

1 ---Upon commencing at 11:00 a.m.

2 MADAM CHAIR: Good morning. Please be
3 seated.

4 Good morning, Mr. Colborne.

5 MR. COLBORNE: Good morning, Madam
6 Chairman.

7 MADAM CHAIR: We're here to hear your
8 motion and we received your written Notice of Motion on
9 September 15th and the motion is for leave to call
10 evidence concerning the suitability for application in
11 the Treaty No. 3 territory of a certain scheme of
12 Native consultation which may be described as the
13 Timber Management Native Consultation Program including
14 the Native Background Information Report.

15 So why don't you begin when you're ready.

16 MR. COLBORNE: Thank you.

17 MADAM CHAIR: Oh, excuse me, one thing.
18 Will we be hearing from the other parties with respect
19 to Mr. Colborne's motion?

20 Mr. Freidin, will you be responding to
21 the motion today?

22 MR. FREIDIN: I don't think I'm going to
23 have much to say. I think our position which is found
24 in one of the letters in regard to the Notice of Motion
25 didn't make it clear to Mr. Colborne, and that was

1 based on the discussions surrounding the Illing Report,
2 we indicated that we wouldn't oppose any application to
3 call evidence in relation to this particular matter.

4 So the matter really is one that will
5 have to be dealt with before the Board based upon its
6 assessment of the situation.

7 MADAM CHAIR: Thank you. Mr. Cassidy?

8 MR. CASSIDY: I may have some brief
9 submissions, Madam Chair.

10 MADAM CHAIR: Ms. Seaborn?

11 MS. SEABORN: Yes, thank you, Madam
12 Chair. Our interest in this motion is more with
13 respect to timing. I'd like to get some indication
14 from Mr. Colborne, should the Board grant his motion,
15 what would be the next step.

16 My client has a concern about anything
17 that may jeopardize the schedule for oral argument.

18 MADAM CHAIR: Thank you, Ms. Seaborn.

19 Okay, Mr. Colborne.

20 MR. COLBORNE: Madam Chairman, should I
21 address the last question raised by Ms. Seaborn first
22 or should I proceed with the submissions on the motion?

23 MADAM CHAIR: Why don't you go ahead and
24 proceed with your submissions and we'll talk about any
25 outstanding matters at the end of this session.

MR. COLBORNE: Thank you. The correspondence attached to the Notice of Motion, as Mr. Freidin has indicated, contains many of the facts which you may want to examine and I will not repeat or even attempt to summarize what is in that exchange.

Needless to say, it contains some matters which are not of concern to the Board and some matters which are in relation to the issue.

I would like, however, to outline how this matter arose, particularly with reference to time, so it will be clear why it is now that I'm before you with this request.

You know that it was in May and June of 1991 that Grand Council Treaty 3 presented its evidence. And you also know that it was in September of 1991 that the agreement between NAN, the Ministry of Natural Resources, and the Forest Industry was presented to the Board.

Following that the sequence, which is very fully referred to in the correspondence, is approximately as follows:

There were discussions as to whether or not the allocation question, which is one of Treaty 3's concerns, would be dealt with in the negotiations. Those discussions have been going on for some

1 considerable time and, in fact, I appeared before you
2 at an earlier time saying the Ministry, in light of
3 your earlier ruling, ought to be negotiating with us
4 and they refused.

5 And then we were told later that day:

6 Well, we will negotiate, but then it degenerated into a
7 further and continuing decline to negotiate the
8 allocation issue, the Ministry of Natural Resources
9 saying: We don't think it's one the jurisdiction of
10 the Board, and I saying: I believe that the Board has
11 ruled on that. But nothing further came before the
12 hearing because I had tried once and it just seemed to
13 be a completely pointless effort.

14 In fairness to Mr. Freidin and Ms.
15 Murphy, they were continually saying: If you want to
16 do that, do it somewhere else, don't do it within the
17 confines of the EA hearing; and I was saying: You have
18 no authority to define unilaterally what is within its
19 confines and what is not.

20 In fact we expended an enormous
21 proportion of our intervenor resources to establish --
22 at least that was our view, to establish that this
23 matter ought to be negotiated.

24 Anyway, it was a complete disagreement
25 and so, therefore, there were no negotiations on that

subject which we considered to be important.

My instructions were, therefore, not to participate in the negotiation process generally, the point being - and I think it's in one of the letters you have - if you will simply not deal with us on the subjects that we think are important, why should we deal with you on the subjects that you define as being the only ones that ought to be discussed.

However, having taken that position, I did not want to stand in the way of any other parties making progress, and so at the time that Mr. Illing's report was about to be filed I was asked as a courtesy to the other parties to consent to that part of the Illing Report dealing with the NAN agreement to be filed as if it was agreed to by all of the parties, and the correspondence attached to the report I think makes that quite clear.

And I was of the view that that
agreement --

MADAM CHAIR: Excuse me Mr. Colborne.

Are you referring to Kathleen Murphy's letter to you of
December 12th, 1991?

MR. COLBORNE: Yes. There are in fact two letters of that date, there's a short two-page letter and there's a longer three-page letter, and

1 perhaps I'll simply give you copies of both in case you
2 want to see what's in the expanded letter.

3 I was proceeding on the basis that that
4 courtesy extended to the other parties made it quite
5 clear that this was to permit all matters to proceed
6 but without any prejudice to my client's position.

7 Another factor that entered into the
8 scheme of things during this time period - and I'm
9 simply making submissions on this, I would not be
10 calling any evidence - but there was a document called
11 a Statement of Political Relationship signed between
12 the Government of Ontario and Grand Council Treaty No.
13 3 and some other parties which my clients took to
14 represent a commitment by the Government of Ontario
15 which would apply fairly broadly and would apply in
16 certain respects to what the government would do in
17 circumstances such as making a decision as to what
18 arguments they would make before tribunals such as this
19 one.

20 In other words, to be more specific, my
21 clients assumed that that statement meant that if Grand
22 Council Treaty 3 said to Ontario: In light of the
23 Statement of Political Relationship we request that you
24 not urge the Environmental Assessment Board to apply
25 this particular administrative procedure in our

1 territory, that that request would simply be honoured,
2 not as a matter of telling the Board what to do or not
3 to do, but in the matter of the position that would be
4 taken by the Crown and party before the Board. The
5 Board can always decide what it wants to do with the
6 matters before it, but the Board cannot tell the
7 parties what position to take and neither can the
8 parties tell the Board what position to take.

9 MR. MARTEL: Could you run that one by me
10 again, Mr. Colborne, because I'm having difficulty
11 understanding exactly what you're saying.

12 Let me put it to you this way: Are you
13 suggesting that Grand Council Treaty No. 3 took the
14 position that based on the document signed they could
15 go to the Government of Ontario, say to the Government
16 of Ontario: We don't want the Board to administer --

17 MR. COLBORNE: No.

18 MR. MARTEL: Okay. Well then run it by
19 me, I missed it.

20 MR. COLBORNE: We don't want your lawyers
21 to urge the Board to decide in a certain fashion. What
22 a party decides to do internally is entirely its
23 business, and that's where this remains exclusively.

24 There was never a suggestion - and to the
25 extent I was involved in it, I tried to make this

1 distinction perfectly clear at all stages - there was
2 never a suggestion that the Government of Ontario would
3 ever have any dealings with the Board itself as to what
4 the Board would decide, but the Government of Ontario
5 certainly instructs its solicitors as to what position
6 they would take.

7 So there was a belief that that statement
8 meant that instructions of that type would be given to
9 the Ministry solicitors and the Ministry would simply
10 not be urging this Board to apply the terms of that
11 agreement within Treaty 3 territory.

12 And that's the matter which was referred
13 to in the Panel 4 reply evidence of the proponent. The
14 Panel 4 reply evidence referred to the Statement of
15 Political Relationship and if I had thought it
16 necessary and productive I would have attended at
17 Sudbury and attempted to clarify what that Statement of
18 Political Relationship meant in circumstances such as
19 this, but it seemed to me that that was a somewhat
20 peripheral type of thing to do and I wasn't concerned
21 about other matters.

22 Anyway that gave rise to the
23 communication between myself and counsel for the
24 Minister, and it was in the course of that
25 communication that it emerged that -- at least my

1 interpretation of the correspondence is that the
2 Ministry does propose to come before you and argue that
3 the terms of the NAN agreement ought to be applied to
4 Treaty 3 territory or ought to be applied across the
5 Board in the area of the undertaking.

6 Now, here's the position that that puts
7 me in: If MNR did not present that as part of their
8 argument, if MNR simply said it's an agreement
9 involving certain parties and we respect it but said
10 nothing one way or the other about whether it should
11 apply in Treaty 3 territory or not, then what you would
12 have before you is practically no evidence, because
13 this agreement was simply presented to you, there was
14 almost no evidence called by Grand Council Treaty 9 - I
15 think there might have been one day of evidence but not
16 focused on the agreement, although there were a few
17 words said about the agreement itself.

18 So you would have a situation where you
19 had almost no evidence, not no evidence, but almost no
20 evidence, in which case I could, as part of my
21 argument, have said: You don't have enough evidence on
22 which to apply this to Treaty 3 territory and,
23 furthermore, nobody is asking you to. And in that
24 circumstance I believed that my clients would be
25 protected.

1 You might decide otherwise. You have an
2 enormous volume of general evidence before you, but I
3 would not feel at risk, or at least I could exercise
4 some professional judgment and say to my clients: I
5 believe that on this particular matter, given the tiny
6 bit of evidence the Board has, I don't think that if I
7 say we don't want it and if I provide the Board with
8 the evidence to that effect, simply by way of filing a
9 document on consent, I don't think it's likely that the
10 Board is going to say: Well, this is going to apply
11 across the province. That would just be a matter of
12 professional judgment and I would proceed in that
13 manner.

14 MR. MARTEL: Can I ask you a question
15 then. If, as I read the T&C, it is merely an option,
16 it is not -- there's nowhere in the agreement, and I've
17 read it a number of times and I've read the T&Cs
18 carefully, which even suggests it's a compulsory form
19 of negotiation.

20 I can't find that in there that it says
21 it's binding on anyone. It says and I read it again
22 this morning just to make sure, that it in fact is
23 purely by invitation and no one has to accept it.

24 MR. COLBORNE: It is by invitation to the
25 local Native communities.

MR. MARTEL: And they can reject it.

MR. COLBORNE: It's not by invitation to Grand Council Treaty No. 3, which is the party before this Board, it's not by invitation to the Grand Council Treaty No. 3 which is the signatory to the Statement of Political Relationship, it completely bypasses my client's ability to act in a governmental fashion.

MR. MARTEL: They say: No, we don't want
that, what happens then?

MR. COLBORNE: Who is the they in that case?

MR. MARTEL: If Grand Council Treaty 3, if somebody sent a letter to one of the -- let's say Rat Portage and the chief and the council in Rat Portage said: Throw that out, we don't want it. What does that do to your client then?

MR. COLBORNE: If Grand Council --

MR. MARTEL: It's not compulsory, it's not mandatory that they enter into any type of negotiation in that fashion, as suggested by that T&C, and they say no -- MNR submits a letter to Rat Portage and says, you know: We're inviting you to participate, chief and council said: No, we're not interested to negotiate in this fashion, so forget it.

MR. COLBORNE: That could happen, yes.

1 MR. MARTEL: And where are you then?

2 MR. COLBORNE: But the Treaty 3

3 organization is a political organization which is
4 joined on a consensual fashion, it's not a military
5 organization where the grand chief --

6 MR. MARTEL: No, but you're not answering
7 my question, Mr. Colborne. If they throw it out.

8 Let's say they did go to Treaty - we won't go to the
9 umbrella organization for the time being - there's
10 agreement, let's say an FMU coming up in an area around
11 Kenora and they're invited to participate and they say:
12 No. How does that influence, because it's not
13 mandatory, how is that not helpful to your clients or
14 how does it adversely affect your clients?

15 MR. COLBORNE: Okay. Now we're getting
16 into what the substance of the evidence would be, and I
17 can give you a couple of points that would be included
18 in the evidence.

19 One is that the preparation of the
20 information that will appear in the document called
21 Native Background Information Report is initially
22 exclusively prepared by the Ministry of Natural
23 Resources and there is -- yes?

24 MR. MARTEL: But you're jumping the gun.
25 I mean, I'm saying at the invitation to participate

1 they say: No, nothing is done.

2 MR. COLBORNE: This document is still
3 prepared, that's part of the procedure. The Native
4 Background Information Report is always prepared,
5 that's prior to the acceptance or rejection of the
6 process. That's my understanding.

7 MR. MARTEL: Well, that isn't the way
8 I've interpreted it.

9 MR. COLBORNE: I have a nod from Mr.
10 Freidin.

11 MADAM CHAIR: What we're trying to
12 establish, before we talk about what the plan author
13 might be doing for any specific timber management plan
14 in any specific management unit, I think the Board's
15 understanding is the way that process begins - and we
16 can hear from you a bit on this subject but we're
17 really not interested until argument about your
18 interpretation of what it means - but for now let's
19 assume that there is no Background Information Report
20 on values identified by a Native community, let's
21 assume that the public notice is sent out at the
22 beginning of a timber management plan in an area of
23 northwestern Ontario where one or more of your
24 communities may be living, as we understand it the
25 invitation will go out to the Native community and that

1 community can say: No, we're not interested in being
2 involved in timber management planning under your
3 Native consultation program, and it can stop at that
4 point.

5 I guess our question to you is: How is
6 that detrimental to Grand Council No. 3, in fact Grand
7 Council No. 3 could say to --

8 MR. COLBORNE: No, Grand Council Treaty
9 No. 3 could not say that, only the local band can say
10 that, and the Ministry of Natural Resources is
11 capable - and this would be evidence that I propose to
12 call - is quite capable of playing a "divide and
13 conquer game", that they would go to a vulnerable,
14 perhaps weakly led local band and perhaps one that
15 needs something else from MNR and say: Here's a deal.

16 Grand Council Treaty No. 3 has no more
17 ability to intervene in that situation than would the
18 Province of Ontario, for example, have the ability to
19 intervene if a municipality was doing something that
20 the Government of Ontario thought was a terrible
21 mistake in terms of the overall situation for the
22 province.

23 I can think of an example, just come to
24 mind, as I'm involved in this Hydro hearing. The City
25 of Windsor, which is a very big city, is starting to

1 say in public: To heck with Ontario Hydro, we're going
2 to buy some natural gas, produce our own Hydro. The
3 Ontario Government may have vigorous -- the Ontario
4 Government can't tell the City of Windsor whether to do
5 that or not.

6 And, similarly, Grand Council Treaty 3
7 could not go to a band that may have been having
8 trouble in one form or another and need something from
9 MNR and say: Don't sign an agreement like that, it's
10 just going to be used as a precedent, it's going to be
11 taken to court and used as proof as to what our Treaty
12 rights are, all kinds of things may be done with that.
13 Treaty 3 can make that representation but cannot reject
14 the process.

15 MADAM CHAIR: Mr. Colborne, in taking
16 that argument a little farther, let's assume there is
17 no such proposal before the Board as a Timber
18 Management Native Consultation Program, let's assume we
19 just have before us the public consultation program
20 that would apply to anyone in the area of the
21 undertaking with no distinction as to whether they're
22 Native communities or anyone else.

23 MR. COLBORNE: Yes.

24 MADAM CHAIR: Is Grand Council Treaty No.
25 3 also threatened -- in your words, would they perceive

1 that there would be a divide and conquer strategy
2 because their member communities, it would be just as
3 open to them to participate in timber management
4 planning generally, they could go to information
5 centres, they could have any participation they wish
6 which might lead to the same result as a Native
7 consultation program.

22 I would say that there's no need for this
23 Board to give its stamp of approval for something like
24 that. The Ministry can go ahead or not go ahead with
25 all sorts of internal dealings with information and

1 they have not presented you with every little policy
2 point in terms of what memoranda get written and what
3 memoranda do not get written internally.

4 MR. MARTEL: Mr. Colborne, we heard
5 evidence from your clients and there was concern
6 expressed that MNR was doing things, making decisions
7 without realizing the Native values that might be
8 involved, whether it was a site of Worship or...

9 How could you do any planning -- if we
10 want to do appropriate planning to protect Native
11 interests, how can you do it without some sort of
12 background information on Natives which could, as my
13 colleague says, then go through the normal process
14 anyway.

15 MR. COLBORNE: The answer that we would
16 provide is that the terms and conditions that Grand
17 Council Treaty 3 has proposed ought to be applied, in
18 which case there would be an overall agreement that
19 would provide those kinds of protections.

20 That would be an agreement negotiated and
21 settled and which would include attention to the rights
22 of individual parties in addition to planning and
23 procedure matters.

24 MR. MARTEL: But we didn't get anything,
25 any definite information on the type of negotiating

1 process that you wanted this Board to impose, any
2 detail at all, that I can recall, outside of -- I have
3 your terms and conditions in front of me, but I don't
4 see much in the form of some definitive sort of way of
5 the negotiations to proceed that were put before us so
6 that we could understand exactly what type of process
7 it is that you wanted on behalf of your clients.

8 MR. COLBORNE: There was no evidence--

9 MR. MARTEL: No.

10 MR. COLBORNE: --particularly on that
11 because the notion of negotiations, I suppose to my
12 mind, is that one doesn't try to define them too
13 closely in advance or you may be constraining the
14 ability of the parties to actually achieve agreement.

15 MR. MARTEL: Yes. And I see that sort of
16 term and condition, but because it's voluntary and you
17 don't have to accept it, doesn't it still mean that you
18 have the option to sit down with MNR and negotiate in
19 the fashion you want on behalf of your clients?

20 MR. COLBORNE: There's nothing compelling
21 MNR to negotiate in good faith however. The government
22 will always negotiate, you can always phone somebody up
23 who works for the province and get to sit across the
24 desk from them. That's what they get paid for.

25 MR. MARTEL: But negotiating in good

1 faith, Mr. Colborne, you and I have seen it where that
2 has been cried many times, it isn't occurring. I
3 don't know how you strangle someone into saying you've
4 got to do it this way.

5 MR. COLBORNE: I don't either.

6 MR. MARTEL: I mean, that's the
7 difficulty without putting something definitive
8 before -- it's very difficult to say precisely what it
9 is negotiating in good faith means.

10 MR. COLBORNE: But that --

11 MR. MARTEL: I mean, at least in the NAN
12 agreement, on NAN's behalf, they reached some sort of
13 way that they wanted to reach -- or a process they
14 wanted to use to negotiate whatever it is they want to
15 achieve. You simply put before us, negotiate in good
16 faith.

17 MR. COLBORNE: Right.

18 MR. MARTEL: But no process, and you're
19 still not asking us for process.

20 MR. COLBORNE: No. The courts every day
21 adjudicate on whether or not a negotiation is
22 proceeding in good faith. That would give my clients
23 the ability, if they thought that it was not proceeding
24 in good faith, to go to court; not come here, of
25 course, but to go to court. It just gives them that

1 additional enforcement ability, which they do not have
2 now. They have absolutely no ability to enforce good
3 faith negotiations, nil, and that's illustrated by what
4 happened before this Board. You said there must be
5 negotiations, there weren't.

6 MR. MARTEL: Well, the negotiations quite
7 frankly weren't all that successful. We've got some
8 sort of agreement. We have the Illing Report that was
9 on a fair amount of negotiation with some limited
10 success, let's put it that way, in my opinion.

11 Now, somebody else might look at it and
12 say: Well, from our perspective it's vastly different,
13 we see a lot more there than you do. But, again, the
14 question is: How do you force people to sit down and
15 negotiate if they don't want to negotiate.

16 MR. COLBORNE: You have the ability to do
17 that; I don't. That's what we're asking for, a
18 decision of this Board.

19 MR. MARTEL: But do we?

20 MADAM CHAIR: Mr. Colborne, we're going
21 to revisit some of what you said shortly but we're at
22 the point now where we're looking at your client's
23 proposed terms and conditions.

24 We received these terms and conditions
25 early on in the hearing, January 31st, 1990, it's now

September, 1992. So far as the Board knows these are the terms and conditions you're asking us to approve.

MR. COLBORNE: Yes.

MADAM CHAIR: They have not changed.

MR. COLBORNE: No.

MADAM CHAIR: You will be addressing yourself to these terms and conditions again in final argument. As you have told us over and over, when we've reached a point in discussions on specifically allocation matters that you would be arguing this before the Board in final argument.

MR. COLBORNE: I am also going to be addressing rights questions. I don't know why - I've discussed this with Mr. Beram - but despite the fact that I stood before this Board on many, many, many occasions and said that I intend to argue Treaty and aboriginal rights questions, it's not even on the outline list.

MADAM CHAIR: Well, yes, we know that you will be doing that and we're expecting to hear from you on those matters.

But this really comes to the question that puzzles us, and that is: What, given that we're going to hear you in final argument about your proposed terms and conditions for which you want Board approval,

1 what more do you have to say to the Board?

2 The situation hasn't changed. We have
3 your terms and conditions, we'll be hearing from you in
4 final argument and we've been anticipating that from
5 the early stages of the hearing. What is the need to
6 bring more evidence before the Board?

7 MR. COLBORNE: There are a number of
8 factual matters of which you should be aware and these
9 are matters which we've touched on to an extent today
10 but which are in a draft evidence statement that I
11 prepared, if you wish to look at it.

12 MADAM CHAIR: Are you referring, Mr.
13 Colborne, to Mr. Kakeway's affidavit, the back page?

14 MR. COLBORNE: No. The Kakeway affidavit
15 was drafted --

16 MR. MARTEL: Five points.

22 And although as I say it points in the
23 direction, it doesn't really include the evidence. And
24 I did have a few words to say, if I may, about how
25 narrow I think this evidence has to be because, I quite

1 agree, you've heard my case, I'm not asking you to hear
2 any more of it, I'm only asking that you hear evidence
3 restricted to what features of the NAN agreement are
4 such that it ought not to be utilized in Treaty 3
5 territory.

6 MADAM CHAIR: Are you prepared, Mr.
7 Colborne, to explain how this evidence would show the
8 Board in some way that this optional Native
9 consultation program proposal would be detrimental to
10 Grand Council Treaty No. 3?

11 MR. COLBORNE: Yes, very much so. That
12 would be the point of the evidence.

13 MADAM CHAIR: Any objections from the
14 parties if Mr. Colborne tries to convince the Board to
15 listen to this evidence without going into great detail
16 about what the evidence is but to describing what it
17 would be?

18 The Board clearly doesn't understand what
19 the content of the evidence would be that Mr. Colborne
20 is trying to persuade us to listen to.

21 MR. FREIDIN: I have no objection if it's
22 going to assist the Board in coming to a best decision
23 on the matter. I think it's appropriate.

24 MADAM CHAIR: Mr. Cassidy?

25 MR. CASSIDY: Madam Chair, I was very

1 carefully listening to what Mr. Colbourne said the
2 evidence would be restricted to. I had the opportunity
3 to review a draft of the evidence that Mr. Colborne
4 kindly provided to me and as long as the evidence is
5 restricted to that which he has just said it would be;
6 that is, what features of the NAN agreement are such
7 that it would not be utilized in the Treaty No. 3
8 territory, my client would not object.

9 My client would object to any evidence
10 that is used to somehow support or buttress the
11 position he's already taken before the Board and on
12 which he already led evidence that the issues of
13 negotiations, allocations and rights, which he's
14 already had the opportunity to lead evidence on, as you
15 know, is already before the Board.

16 There's been far too much evidence
17 already in this hearing, one might argue and,
18 therefore, there's no need to revisit that evidence on
19 those issues.

20 But with respect to Mr. Colborne leading
21 evidence as to what features of the actual agreement
22 that you have before you that his client does not want
23 applied to his territory or, indeed, the whole
24 agreement itself, I would have no objection to the
25 introduction of that evidence.

1 I would have thought, and my client has
2 discussed, that this would be simply a matter of saying
3 to the Board: Please don't apply it in our area and
4 that would be the end of it; however, if he feels the
5 necessity to lead the evidence and the Board is so
6 inclined to listen to it, then so be it.

7 MADAM CHAIR: Thank you, Mr. Cassidy.

8 Ms. Seaborn, any objections?

9 MS. SEABORN: I don't have any
10 submissions at this time.

11 MADAM CHAIR: Okay, Mr. Colborne. If you
12 can give us a description, without giving us the
13 details of this evidence you want us to listen to, we
14 will hear this, but at the same time we will ask you
15 when this submission is over why these matters can't be
16 addressed by you in final argument.

17 Did you want to give us a copy, Mr.
18 Colborne?

19 MR. COLBORNE: Yes. (handed)

20 MR. MARTEL: Thank you.

21 MADAM CHAIR: Thanks. Do you want to go
22 ahead, Mr. Colborne.

23 MR. COLBORNE: I wish to conclude my
24 submission. A few minutes ago I described to you the
25 situation that I thought my client would be in if this

1 evidence was not heard, it was that the Board would
2 have before it a little bit of evidence plus the urging
3 of at least one party, the proponent, and perhaps
4 others, that it be applied across the area of the
5 undertaking, and I assess that as being a situation
6 that would put my clients at risk, because - I want to
7 stress this - because the content of the NAN agreement
8 arose after we gave evidence. If it had been there at
9 that time then I would have nothing to say to you and I
10 wouldn't be here.

11 But if the scenario is different -- well,
12 excuse me, I think I'm not drawing the distinction
13 carefully enough.

14 If you have a little evidence plus urging
15 from the parties you may decide to apply it across the
16 area of the undertaking, but if you have a little
17 evidence and no urging from the parties, which I
18 thought would be the case, then I thought that it was
19 highly unlikely that you would apply it across the area
20 of the undertaking if asked not to, and in that
21 somewhat fine distinction lies the reason why I am
22 here.

23 But after four years I do not feel that I
24 should be exposing my client to a risk that I think is
25 real, even though perhaps dependent on a fairly

1 technical distinction. However, in the gap between
2 those two scenarios I do want to place a little bit of
3 evidence just so you will know why I will be before you
4 in argument saying: Don't apply it here.

5 And I would be in complete agreement with
6 a definition of the range of the evidence to be
7 evidence which goes no further than to give you
8 information as to why it would potentially be damaging
9 to my client's interests if the terms of the NAN
10 agreement were applied in the Treaty 3 territory.

11 MADAM CHAIR: Are you saying now, Mr.
12 Colborne, that you believe you can't stand up in front
13 of the Board -- give us written argument or stand up
14 and give us oral argument on these issues without
15 putting this evidence in front of us? You don't see
16 this as being matters for argument?

17 MR. COLBORNE: On these subjects I do not
18 believe there is any evidence or almost no evidence, so
19 I can't present argument when there's no evidence upon
20 which to base it.

21 MADAM CHAIR: Did you want to go through
22 these six items?

23 MR. COLBORNE: The evidence which I
24 believe the Grand Chief would give would be in relation
25 to, No. 1, practical examples of how there is a

1 tendency in the field where Treaty and aboriginal
2 rights arise for interim measures of various kinds to
3 be put in place because they're convenient in one way
4 or another and because of the difficulty of the larger
5 questions become entrenched and substituted, in fact,
6 for the larger rights. He wouldn't just make a
7 statement, he would give examples of that happening.

8 With respect to the second point, my
9 witness would give examples of situations where
10 information about land use and resource use from Native
11 communities had been misused and why it's essential, in
12 his view, that there be protections against such
13 misuse.

14 In respect to the third point, my witness
15 would give examples of why it is inappropriate for the
16 Ministry of Natural Resources to be the author or the
17 sole author of the Native Background Information Report
18 and that a preferable manner of proceeding would be
19 for any such report to be authored at least jointly.

20 With respect to the fourth point, I've
21 already mentioned this in discussion with you, there is
22 a concern that the Ministry of Natural Resources - and
23 certainly not as a matter of policy but perhaps as a
24 matter of local expediency that one can never really
25 predict - might take advantage of the situation and

1 then that situation becomes the precedent, it becomes
2 entrenched within the bureaucracy as representing this
3 is the way it has to be done to the detriment of other
4 First Nations communities.

5 Point 5. The witness would give a little
6 evidence as to the current situation -- well, excuse
7 me, I'm not sure that that would be quite within the
8 boundaries that I'm discussing.

9 Would give evidence concerning the
10 distinction between the Treaty 9 territory and the
11 Treaty 3 territory in terms of the connection of the
12 Government of Ontario with the Treaty. There has been
13 nothing heard about that. That evidence will take
14 about 30 seconds, but it is something that you do not
15 know about now, I'm certain that nothing was presented
16 to you in that respect.

17 In regard to point No. 6, the witness
18 would give you a little bit of factual information
19 about the different types of situations that prevail in
20 different areas within Treaty 3 simply to illustrate
21 that in some areas a certain pattern might make a lot
22 of sense but in other areas wouldn't make sense at all.

23 In the somewhat congested Kenora/Sioux
24 Narrows area for instance, a plan where you have one
25 token Indian community -- excuse me, I don't remember

1 the - the local citizens committee, would be a
2 completely pointless exercise; whereas in a more remote
3 area that might be very appropriate. Simply so you
4 would be aware of the regional or the area differences
5 within the region, and that would be the extent of that
6 evidence.

7 That would give me the ability to make
8 certain arguments accordingly. That's the evidence
9 that I hope to have permission to call.

10 MADAM CHAIR: Mr. Colborne, on the first
11 subject that you would want to bring some evidence on,
12 is it your belief that the Board sees NAN and Grand
13 Council Treaty No. 3 as being very similar or
14 comparable organizations or collections of communities?

15 In other words, is it clear to you and
16 your client that the Board doesn't see all Native
17 communities as having the same characteristics and the
18 same history and the same needs and the same demands?

19 Is one of your concerns that the Board
20 sees Grand Council Treaty No. 3 as being
21 interchangeable with NAN?

22 MR. COLBORNE: No. You have heard so
23 much evidence and it's, I would say, clear in one's
24 general understanding of the north that you have that
25 you would not have that belief.

1 My worry is the fact that you can make
2 decisions only on the basis of the evidence before you
3 and that there isn't evidence on that question because
4 NAN did not call evidence. You heard very, very little
5 about NAN.

6 MADAM CHAIR: We do have written
7 evidence, we do have written evidence that was not
8 cross-examined but evidence on NAN's situation and
9 their historical circumstances.

10 MR. COLBORNE: This is through -- there
11 were evidence statements filed.

12 MADAM CHAIR: They were not given much
13 oral examination-in-chief, nor was there
14 cross-examination on those matters.

15 MR. COLBORNE: I'm not clear that they
16 were even entered as exhibits.

17 MADAM CHAIR: One or two were, some were
18 not, some were subsequently withdrawn. But we do have
19 some written evidence from NAN before us.

20 MR. COLBORNE: Very well. I did not, in
21 preparing for today, carefully look at what you did
22 have and what you didn't have, I examined the
23 transcript. And I, of course, in the past looked at
24 the written evidence statements and I thought though
25 that very little of it had gone over that line into

1 evidence.

2 But I do understand what you were
3 indicating, that you certainly have information and
4 evidence upon which you could decide that the two
5 regions are sufficiently separate or sufficiently
6 distinct that an agreement made in one does not
7 necessarily apply in the other. I understand that you
8 do have before you sufficient evidence and information
9 to take that view.

10 I guess my worry was that there wasn't
11 any evidence, or very little to protect my clients in
12 the event that you did not have that view and, of
13 course, I don't know until I get that decision in the
14 mail what your view is in the end. And so I have to be
15 very careful about points of view that might arise and
16 protect my client against each one of them.

17 I might consider it unlikely that you
18 would take that perspective, but there is nevertheless
19 a risk. I believe it's my duty to do what I'm doing
20 now, for instance, and stand up and say: Well, I have
21 identified an area of risk and I do not think there is
22 evidence on it, so I would like to put some evidence in
23 to plug that gap, as it were, is really all I'm asking.

24 But if you're indicating to me now -- I
25 have no desire to put my client to expense and trouble

1 to come here to give you a little bit of the evidence
2 which is probably very much in accordance with what
3 your understanding of the situation is anyway but,
4 nevertheless, there are certain things I feel I have to
5 do.

6 MADAM CHAIR: Could you explain for the
7 Board once again, and maybe I missed it, but what
8 changed between November, 1991 when you saw the
9 Illing -- or when the Illing negotiations -- when the
10 negotiations had been completed, we received a copy of
11 the report in December, why didn't you raise this
12 matter before the Board in -- well, even January.

13 Are you telling us that it was a complete
14 surprise to you that the NAN agreement, the essence of
15 it got into the Illing negotiations and that MNR came
16 out with a proposal for a Native consultation program?

17 I guess in MNR's proposed terms and
18 conditions of January of this year the Native
19 consultation program was a proposal, a written proposal
20 before us, and we are now hearing your objection on
21 September 24th, 1992.

22 What happened in those intervening
23 months? And, of course, we're very concerned about
24 this because we're finished hearing evidence for four
25 and a half years and we don't want to open the door to

1 hear- not that you might not have very a good case for
2 this - but when does a hearing like this ever end, is
3 this Board going to be faced with applications and
4 motions from all the parties that they have one more
5 thing they want to say before we make our decision,
6 and we have to concern ourselves with that part of our
7 process.

11 MR. COLBORNE: I thought that there was
12 an implied agreement arising out of the sequence of
13 events in the fall of 1991 that the proponent would not
14 be arguing that the terms of the NAN agreement ought to
15 apply across the area of the undertaking. That's what
16 I thought was the status quo.

17 MR. MARTEL: And when did you learn that
18 wasn't the case then?

19 MR. COLBORNE: On the day that I
20 telephoned Kathleen Murphy.

21 MR. MARTEL: The 29th of June, or
22 thereabouts?

23 MR. COLBORNE: It was in July, I believe.

24 MR. MARTEL: Or thereabouts

25 MR. COLBORNE: Oh, it was the 29th of

1 June when I phoned to try to arrange a meeting to sit
2 down and say: Here, here is the position in writing
3 of my client so, therefore, I trust there is no -- you
4 know, there's no ambiguity here as to what's going to
5 happen. But it was not until some time in July that I
6 actually spoke to Kathleen Murphy.

7 MADAM CHAIR: But from January, 1992
8 until July, 1992 MNR's proposed terms and conditions
9 have been before the Board and that didn't concern you,
10 or you didn't see that that's what was being proposed?

11 MR. COLBORNE: Well, I thought that there
12 was in place this implied agreement, that the proponent
13 would not be standing before you and saying this should
14 apply to Treaty 3 because of the way that the Illing
15 report matter was handled.

16 Because in fact the Illing report was the
17 immediate predecessor to the draft terms and conditions
18 there was a flow and I thought that there was a point
19 in that flow when an agreement was in place and so the
20 various stages after that I thought were simply to the
21 same effect.

22 MADAM CHAIR: Okay. I still don't
23 understand what happened between January and July
24 because nothing has changed in front of the Board since
25 January 6th with respect to the proposed native

1 consultation program.

2 MR. COLBORNE: Well --

3 MADAM CHAIR: And we don't know what goes
4 on behind the scenes, all we know is that's nothing
5 changed since January 6th, 1992.

6 MR. COLBORNE: Well, if you look at the
7 reply evidence statement No. 1, I think it is, there is
8 a reference in there to the fact that Treaty 3 did not
9 participate in that and that was taken by me as being a
10 signal that the Ministry would not be urging you to
11 apply it, except in the NAN territory.

12 MADAM CHAIR: We have known since
13 December 12th in the Illing Report, since December
14 12th, 1991 that Grand Council Treaty No. 3 was not a
15 signatory to the Illing Report and that you withdrew
16 from the negotiations.

17 MR. COLBORNE: Well, perhaps if I had
18 been attentive to the distinction that can be made
19 between the course of events following from the
20 negotiations and the Illing Report it would have
21 occurred to me at an earlier time: Wait a second,
22 maybe I should not assume anything about what MNR is
23 going to do.

24 But it didn't occur to me, I thought that
25 that MNR would be coming before you in argument saying,

1 as you know, this is a good agreement, we like it,
2 applies in NAN territory, that's all we're asking for.

3 And to that extent it was a bit of a
4 surprise to me, but I can't say that if I had thought
5 of every possible interpretation of the documentation
6 as it was coming out that it would not have occurred to
7 me.

8 MR. MARTEL: See, the difficulty I'm
9 having, Mr. Colborne, we have Native groups on
10 Manitoulin Island who've made representation and OMAA
11 and that is an option for them to look at if they want
12 to negotiate. I mean, if MNR says -- to take part in
13 timber management at all, then that is an option, one
14 of the options available to them.

15 They don't have to accept it. They can
16 say to MNR: Sorry, we're not doing it that way, we're
17 going to be part of the regular process, or we're not
18 going to take part at all and we want you to negotiate
19 more directly with us as a group.

20 Because I don't know how you tear the
21 province up into pieces and say something like this can
22 be -- unless you make it optional, that you don't have
23 to opt in or you don't even have to be part of the
24 process. I mean, I looked at one of the things you
25 want to look at, No. 3, and I would think that if the

1 Ministry of Natural Resources were so stupid as to not
2 involve the Native communities in the background
3 information -- I mean, OFIA has before us a proposal
4 that would have people involved from day one when the
5 notice that -- not even to participate, but a notice
6 that a timber management plan is going to occur that
7 the local citizens group will be involved then in even
8 assembling the background information.

9 I don't think that's much different than
10 what you're saying on behalf of your people. You want
11 your people, your clients involved much earlier than
12 when a report is handed to them as a fate accompli.

13 One of the arguments OFIA will make is,
14 we want it sooner to resolve any conflicts which might
15 arise and get to a better solution to the problem of
16 timber management, the problems that arise.

17 I would think MNR would be absolutely
18 ludicrous to try to go to a native community and say:
19 Her it is, we're now saying this is the document
20 without involving the Native communities much sooner to
21 get -- if they want meaningful dialogue, how else could
22 they get it?

23 As I say, I only look at No. 3, Mr.
24 Colborne. I could have gone to some others there that
25 other people will be making the same argument that

1 you're going to be making.

2 MR. COLBORNE: It depends on who has the
3 decision power to opt in or opt out though and I'm
4 speaking for my party. Grand Council Treaty No. 3 had
5 that ability, then the answer to your question is yes,
6 no difficulty.

7 But what the proponent is suggesting is
8 that it must be a community by community basis and my
9 client is concerned that its rights, its legal rights
10 will be undermined by such a process.

11 MR. MARTEL: See that's the difficulty
12 guess I'm having. If I understand the native
13 organization, each First Nation group will make its own
14 decisions. I think some of the evidence you presented
15 during your case was that you can't -- the umbrella
16 group can't - and I think it was as a result of one of
17 the involvements of one of your community groups in
18 making a direct agreement with MNR - that some problems
19 arose and I don't think your Grand Council Treaty 3
20 particularly appreciated that.

21 And so I'm having difficulty saying:
22 Well, do each of the band councils make the decision or
23 is it the umbrella group that makes the decision. My
24 understanding is the reverse, it's from the bottom up.

25 MR. COLBORNE: The umbrella group deals

1 with the rights, constitutional rights. No other party
2 before you has constitutional rights. The industry
3 umbrella group can't tell one of the forest
4 corporations what to do, that would be ridiculous, it's
5 just a representative group.

6 MR. MARTEL: That's right.

7 MR. COLBORNE: Similarly, Grand Council
8 Treaty 3 cannot tell a local First Nation community
9 what to do. But the difference is that Grand Council
10 Treaty 3 has the mandate to protect the constitutional
11 rights of its members, whereas the individual
12 communities generally speaking don't have the expertise
13 the experience, the government to government
14 relationships, so-called according to the Statement of
15 Political Relationship with the government, and that's
16 the distinction. And I submit to you that it's a real
17 one.

18 So if it were possible for Grand Council
19 Treaty No. 3 to say to the proponent: Thanks, but we
20 don't want this process in our territory until we've
21 worked out all the details which we think are important
22 and which will make sure that our rights are not
23 compromised, things like protecting the information,
24 then I entirely agree with you, I would not need to
25 call any more evidence, it would be fine.

1 But what the proponent is going to be
2 arguing is that the local Ministry of Natural Resources
3 people can go to the individual communities and say:
4 Here, give us all the information about where you
5 harvest rice, a year later if the wild rice treaty
6 issue is in court I guarantee you that Ontario lawyers
7 will be there because I'm handling cases where they do
8 that, they take information that they get from various
9 places and they take it to court and they use it to
10 prove or undermine rights issues. That's the concern.

11 Now, NAN, as they negotiated the
12 agreement, no doubt have said enough and put enough in
13 there to protect their rights. We did not negotiate
14 that agreement, my clients did not, so we can't say
15 there's enough in there to protect our rights and
16 neither do we have the ability to dictate to the local
17 communities and, therefore, my client's situation is at
18 risk.

19 MR. MARTEL: But next week -- if we grant
20 this, next week somebody from Wiky could come along and
21 say: We want to present new evidence now because we
22 don't want to this negotiating process to apply to Wiky
23 who also haven't put forward a planning process that
24 they believe they should be involved in.

25 And what you're saying is that the only

1 place NAN agreement should apply in Ontario is in NAN
2 territory.

3 MR. COLBORNE: No, it may be that the
4 other parties would make other submissions, I simply
5 don't know. I'm saying the problem, from my point of
6 view, is that you don't have evidence upon which to
7 make a decision if there are impending arguments before
8 you.

9 MADAM CHAIR: Mr. Colborne, the Board has
10 never assumed that all the NAN communities would be in
11 favour of taking part in the Native consultation
12 program. I mean, the individual communities may say:
13 No, we don't want to do that. That is the optional
14 part and, as you can tell, the Board's having a real --
15 is having difficulty understanding what you mean by
16 optional versus what other meanings might be.

17 Optional is you're not obliged to do
18 anything about it.

19 MR. COLBORNE: Who's the you in there,
20 that's the question.

21 MADAM CHAIR: Well, anybody. Your
22 feeling is that if something is optional it's being
23 forced upon you. I would suggest that the individual
24 NAN communities would in no way feel obligated to take
25 part in this process that their umbrella group seems to

1 have supported.

2 MR. COLBORNE: Yeah, but their umbrella
3 group presumably had played the role that it is
4 assigned, and that is to build into terms of that
5 agreement the kind of protections that they think they
6 need, rights protections.

7 MADAM CHAIR: Well, I don't know about
8 that. We didn't hear evidence from NAN.

9 MR. COLBORNE: Of course, there's almost
10 no evidence. My client has never had the opportunity
11 to do that, and so it says that its rights, its
12 members' rights have never in the nuts and bolts of the
13 process been addressed for purposes of protection.

14 MR. MARTEL: Well, that's not I don't
15 think quite factual though. You had an opportunity to
16 present anything you wanted to the Board, Mr. Colborne.

17 We didn't limit you in any way, shape or
18 form when you were presenting your evidence to tell us
19 precisely what it was you were asking this Board to do
20 and, I mean, hindsight is wonderful, but you chose the
21 case you were going to present to the Board, as NAN
22 did, as OFIA did, and what you wanted to include in
23 there was entirely - and I'm only making reference to
24 that one little point - where you just said Grand
25 Council Treaty 3 didn't have an opportunity. My

1 understanding is that you could have presented anything
2 to us.

3 MR. COLBORNE: Yes. Well, I'm saying
4 that --

5 MR. MARTEL: I think we're just hanging
6 on that little area.

7 MR. COLBORNE: Yes. The substance of the
8 NAN agreement arose after we had closed our case and it
9 was the type of matter which, I would say, reasonably
10 could not have been anticipated. It did not arise
11 clearly or directly out of the proponent evidence or
12 any of the evidence that came before you, and it's only
13 in that sense that I think I have any right to be
14 before you here.

15 And your concern, I think other parties
16 might in theory be able come forward and say something
17 very serious arose after we presented our evidence, but
18 I've heard that no one else -- I haven't heard any
19 such. I hope we're not opening the floodgates gate
20 here, but I can't say it's not possible.

21 MR. MARTEL: But as I say, when I put to
22 you what if -- I mean, look at, for example, Manitoulin
23 Island really has a fairly large Native population,
24 they could come forward and say: Well, the NAN
25 agreement, even though it's optional, shouldn't apply

1 to us. I mean, how does one -- that puts us in the
2 same position you're in, they come forward and say: We
3 want another kick at the can, so to speak.

4 MR. COLBORNE: I don't think there's
5 anything that would prevent another party to make the
6 same type of submissions I'm making, but judgment would
7 have to be exercised first as to whether that party
8 considered itself to be at risk.

9 I represent the party that has been
10 stressing from day one that the legal and
11 constitutional rights of the people I represent are in
12 issue. Nobody else has been saying that, and that's
13 part of the -- that's one of the blocks upon which my
14 position today is built.

15 So I tend to think it would be highly
16 unlikely that anybody else, for instance, from
17 Manitoulin would come forward with an ability to say
18 anything more than we want another kick. I don't think
19 I'm saying I want another kick, I'll stay assiduously
20 away from that that has been dealt with previously.

21 MADAM CHAIR: On that point, Mr.
22 Colborne, when we look at the six items that you are
23 suggesting would be the narrow focus upon which you
24 would want to call more evidence, a very quick reading
25 of that would suggest that item 3 is really the only

1 one pertaining to the NAN agreement, Timber Management
2 Native Consultation proposal in front of us by MNR; the
3 others are in fact pointing to evidence that we've
4 already heard from you as to the misuse or abuse of
5 your communities' interests over many years.

6 Certainly we've received a lot of
7 evidence about the dealings of Grand Council Treaty No.
8 3 with governments, also the issue of where you stand
9 on your Treaty rights and the allocation issues we've
10 heard from you in your evidence and we're going to hear
11 from you in arguments, so when it comes down to that
12 risk that you talk about with respect to something that
13 happened after your case was in, according to this list
14 you're really asking the Board to hear something it
15 hasn't heard before with respect to the Native
16 Background Information Report.

17 MR. COLBORNE: I fail to see clearly why
18 item 3 is different from the other ones, because you
19 have heard evidence about, I would suggest, just
20 generalizing, about point 3, about why the Ministry may
21 be in, let's say, a conflict of interest situation in
22 terms of assembling information on Native lands and
23 resource use. I think you have some evidence on that.

24 MADAM CHAIR: I think we have evidence on
25 how Native communities might view MNR's ability or

1 success in doing that. But what I'm trying to say is,
2 if we grant your motion, if we say, yes, we won't let
3 you split your case, we won't let you give us evidence
4 we've already heard from you, we understand, and the
5 reason for that is we understand, as you put it, your
6 client is at some risk because something happened after
7 your case was finished, what happened after your case
8 was finished is that in MNR's proposed terms and
9 conditions of January, 1991 there is a proposal to give
10 a Native consultation process, an optional process to
11 Native communities throughout the area of the
12 undertaking.

13 And in this list of evidence the only
14 thing I can see that specifically pertains to that that
15 we haven't heard from you before on is item No. 3. We
16 have heard of the mistrust your community has within
17 its dealings with government, we've heard of the
18 historical circumstances and the difficulties there
19 have been in respect of your Treaty rights and matters
20 of allocation, we have that in front of us, and you can
21 speak to those issues in argument.

22 What's new. I'm looking at what you're
23 giving us, I'm saying what's new, why should Mr.
24 Colborne have to bring more evidence before us? And
25 this is what I'm saying. I'm saying you have

1 identified one issue here and that is the Native
2 Background Information Report proposal, that is
3 something we haven't heard from you, from your client
4 on. The other issues mentioned here, I think it's
5 pretty clear to the Board where you stand.

6 MR. COLBORNE: Excuse me, the Board --

7 MADAM CHAIR: It's pretty clear to the
8 Board where your client stands on issues of Treaty
9 rights and matters of allocation and mistrust of
10 governments, and your terms and conditions haven't
11 changed. You've put before us your proposals and we're
12 going to hear from you in argument. You want to put
13 something else in front of us.

14 MR. COLBORNE: I characterize what
15 changed in a different way. I characterize what
16 changed as being the making of the NAN agreement.

17 If there had been no such thing and the
18 Ministry had simply put in a Native consultation
19 proposal in their draft terms and conditions, then I
20 don't think I'd be able to come here and ask to call
21 further evidence unless it, as you suggest, contained
22 something quite startlingly unanticipated, as it
23 were.

24 MADAM CHAIR: Now, I'm lost completely.
25 I thought your problem was not the NAN agreement but it

1 was the proposed Native consultation program.

2 MR. COLBORNE: Yes, but it flowed
3 directly from the NAN agreement. It was a sort of step
4 by step process.

5 If MNR had just internally developed a
6 Native consultation process and threw it on the table
7 as part of its proposed terms and conditions then I
8 would be like any other party, if there had been no
9 agreement on it, be coming forward and saying yes or no
10 to it on the basis of the evidence that is before the
11 Board.

12 But this -- the substance of that
13 agreement has more -- is more than simply an MNR
14 proposal, it's an agreement that's based entirely on an
15 agreement between particular parties and MNR is going
16 to be urging that you apply it to other parties.

17 MADAM CHAIR: Can you tell the Board
18 again why your party can't ignore the proposed Native
19 consultation program, tell the Board why Grand Council
20 Treaty 3 and its communities can't just ignore an
21 optional program.

22 It's not there to force you to do
23 anything, it exists as an option, you as a body are
24 individually free to say we will have nothing to do
25 with this, and we can understand you're going to tell

1 us that in argument.

2 MR. COLBORNE: The proposal, as it's
3 framed, does not give Grand Council Treaty 3 the
4 ability to do that, only the individual communities
5 have the ability to do that.

6 MADAM CHAIR: Well, I would think that
7 you -- as an organization of separate communities you
8 meet and you decide what you will do as a body, you
9 will say -- Grand Council Treaty No. 3 will say to its
10 communities, let's talk about this and let's decide,
11 we're not going to have anything to do with this, it's
12 not an option for us and whenever we're approached
13 we're going to say we don't want to do it. What stops
14 you from saying that?

15 MR. COLBORNE: Well, that may be
16 possible, but I gave the example of the Government of
17 Ontario and municipalities. There may be an agreement
18 of that kind, but it's not binding and the important
19 distinction is the question of rights.

20 Just as the Government of Ontario must
21 protect its constitutional powers and municipalities
22 don't get involved with that, Grand Council Treaty 3
23 has the mandate to deal with constitutional rights,
24 that is the Treaty rights of Indians in the Treaty 3
25 area and the individual First Nations do not normally

1 have very much directly to do with that, but this
2 process as it's framed now bypasses that completely.

3 MADAM CHAIR: Have you discussed with MNR
4 the wording in its terms and conditions; is there any
5 wording that can be changed in the proposal that would
6 satisfy your client with respect to -- you want to go
7 on record somewhere, Mr. Colborne, your client does,
8 that you do not support MNR's proposed Native
9 Consultation Program?

10 MR. COLBORNE: Yes.

11 MADAM CHAIR: You want that to be on the
12 record somewhere?

13 MR. COLBORNE: Yes. I think that may be
14 almost the central point of the lengthy exchange of
15 correspondence. I was merely saying in very short form
16 I thought that if Treaty 3 said no you would just
17 agree.

18 Aside from what the Board may decide, you
19 have any number of bases to decide any number of ways
20 upon these types of issues, but...

21 MADAM CHAIR: But isn't that the very
22 reason that this is an optional program, that you're
23 not required to opt in to it that, in essence, MNR by
24 calling it optional somebody out there, someone in the
25 four and a half years of this hearing has said to MNR:

1 We're not going to support it. Presumably MNR knew
2 that your party would not support this program and so
3 that's why they've made it optional.

4 MR. COLBORNE: Well, that's why I sent a
5 copy of the chief's resolution, that is a decision made
6 by the chiefs all in assembly in June to the Ministry
7 thinking, as maybe you're saying now, that that would
8 be the end of it. But that seems not to have been the
9 end of it. Maybe Mr. Freidin could clarify.

10 If that's the case, if the proponent will
11 simply accept that, then there's no need for any of
12 this and I don't think that they have, I think they
13 want the ability to go to individual communities with
14 their procedure, never having the agreement or
15 endorsement from Grand Council Treaty 3.

16 MR. MARTEL: Let me ask you, Mr.
17 Colborne, as of today, let us say around Rainy River,
18 this is just hypothetical, can you force management
19 agreement -- the plan for it, the timber management
20 plan is about to start for the next five years. Now,
21 we've got a planning process under way. What position
22 does Grand Council Treaty 3 take with respect to the
23 involvement of, let's say, two communities that are in
24 that area? How would you deal with it from now on?

25 MR. COLBORNE: We would say that before

1 proceeding there should be in place a negotiating
2 structure so that -- well...

3 MR. MARTEL: We don't have that.

4 MR. COLBORNE: There should be.

5 MR. MARTEL: Yeah, but we don't have it
6 and you didn't present it.

7 MR. COLBORNE: Well, you can order it; I
8 can't order it.

9 MR. MARTEL: Well, wait a minute. How
10 can I order a -- you want my colleague and I to draft a
11 negotiation process to include, as part of the order of
12 this Board, we're going to tell --

13 MR. COLBORNE: You can say --

14 MR. MARTEL: No, let me finish. We're
15 going to tell the Native communities, we're going to
16 impose on them, along with MNR, a negotiation process;
17 is that it?

18 MR. COLBORNE: No, no absolutely not.

19 MR. MARTEL: Well, tell me then, because
20 that's what I hear you saying to me.

21 MR. COLBORNE: No. You are going to
22 require that it take place but you're not going to
23 write the details and you don't have to know what the
24 details are.

25 MR. MARTEL: Well, who is? Who's going

1 to write the details?

2 MR. COLBORNE: The parties.

3 MR. MARTEL: Pardon?

4 MR. COLBORNE: The parties. But if the
5 parties refuse to participate, then nobody is going to
6 write the details.

7 MR. MARTEL: And we will do that
8 differently in every area of the province.

9 MR. COLBORNE: No, you only have four
10 Native parties before you.

11 MR. MARTEL: Sure. But, Mr. Colborne,
12 what do we do -- do we have a separate way of doing it
13 in -- you see...

14 MR. COLBORNE: Very easily.

15 MR. MARTEL: I'm not sure it's as easy as
16 you say it is because I can't -- we've only heard of
17 one negotiation process put before us, that's by NAN,
18 it's been made optional, it doesn't have to apply
19 anywhere else, and you're saying that's not adequate,
20 and I'm saying to you: Well, tell me how -- what do
21 you envisage for two communities in the Rainy Lake area
22 or Rainy River area if a new plan. And you say: Well,
23 force negotiations on them, and you started to say that
24 there would have to be a negotiation process.

25 MR. COLBORNE: Yes.

MR. MARTEL: And I said to you, what is that negotiating process. And then you seemed to backtrack a little on me.

MR. COLBORNE: I'm not backtracking.

MR. MARTEL: What is the negotiating process?

MR. COLBORNE: I'm telling you that negotiations are consensual, they're not imposed and that's --

MR. MARTEL: But this isn't imposed either because it's one of the options that's available. You don't have to accept it, you can say to heck with them, we're not getting involved with that at all.

MR. COLBORNE: May I repeat myself, the
you involved here is not my client, my client does not
have the ability to accept or reject that. Those two
communities in Rainy River that you refer to have, yes,
but they do not have the ability generally speaking to
protect their constitutional legal rights.

MR. MARTEL: Who's going to put in place for those two communities, Mr. Colborne, the negotiation process that should occur?

MR. COLBORNE: MNR if they want to.

MR. MARTEL: Oh wait a minute, but that's

1 imposed by the great white father then.

2 MR. COLBORNE: No. Until the negotiating
3 process has produced some results, I'm saying that this
4 Board should not put its stamp of approval on that
5 great white father approach which you're being asked to
6 do. You should just be silent on that and say: Until
7 you've got an agreement with the Indians who have
8 rights out there, we're not going to put our stamp of
9 approval on anything. That doesn't stop MNR from doing
10 what they do.

11 MR. MARTEL: That's what I thought that
12 something optional was about, if you don't want it --

13 MR. COLBORNE: It's not optional for my
14 client, my client cannot say we don't want it. That's
15 what all that exchange of correspondence is about. We
16 said we don't want it.

17 MR. MARTEL: Well, you see, I guess you
18 and I have a difference of what optional means. If I
19 don't want to -- if I have an option to be part of
20 something or not that says, you have an option to
21 accept this process or not, and I say: No, I'm not
22 opting in, I'm not buying, now come back with a counter
23 offer, that's negotiations.

24 My understanding, and I did some
25 negotiations in my time, my idea of the way

1 negotiations work when they're not happy with this I
2 say to somebody: Well, put something else on the table,
3 that's not good enough, put something else on the table
4 before I'm prepared to talk turkey.

5 MR. COLBORNE: But you keep saying you as
6 if my client --

7 MR. MARTEL: You represent your client,
8 and that's just a turn of phrase. I mean you have a
9 client who says I don't want to operate with those
10 terms.

11 MR. COLBORNE: No, no, no. My client
12 does not have the ability to say that. That's what we
13 tried to say.

14 MR. MARTEL: I understand what you say,
15 the individual communities can go ahead and negotiate
16 despite your --

17 MR. COLBORNE: Yes.

18 MR. MARTEL: And that's your concern.
19 And that's the nub of your concern.

20 MR. COLBORNE: I'm saying if that's the
21 position that they are put into, then their
22 constitutional rights are at risk.

23 MR. MARTEL: And my colleague said to you
24 is there not a way that you could negotiate that with
25 MNR. Was there no discussion to particularly trying to

1 resolve that in some wording that says --

2 MR. COLBORNE: MNR says that rights
3 question is not before the Board and is a matter for
4 argument, that's fine; MNR has said the allocation
5 question is not before the Board and we're not going to
6 negotiate with you. So how could that be negotiated.

7 That's why I'm going to be coming before
8 you and saying you're going to have to make them
9 negotiate. And until those negotiations have matured
10 into something, then I don't think you should put your
11 stamp of approval on what seems to be a great white
12 father approach that MNR is going to draw up, their
13 Native Background Information Report.

14 MR. MARTEL: No, but there wasn't -- in
15 this case I'm saying it was a different approach, I'm
16 saying. MNR negotiated with the OFIA and the NAN
17 representatives on behalf of their communities on the
18 type of proposal or the type of process they wanted.

19 MR. COLBORNE: Absolutely and we respect
20 that and we assume they have the protections that they
21 want for their territory.

22 MR. MARTEL: And we didn't hear that
23 argument from any other Native community that we could
24 enter in some sort of agreement on behalf of all the
25 people we represent in an area. This sort of --

1 whatever negotiating process you might want in there
2 was never raised by any other group except NAN, except
3 yours in broad terms which says you must negotiate. I
4 don't see a process in place outside of saying to the
5 Ministry, negotiate in good faith.

6 MR. COLBORNE: That's what we're asking
7 for, that's the gist of our case.

8 MR. MARTEL: That's what I'm saying. But
9 it doesn't define what that means or how it will be
10 achieved.

11 MR. COLBORNE: Well, why is that
12 essential?

13 MR. MARTEL: It's not there, I'm simply
14 saying. The only group that's presented that position
15 has been NAN.

16 MR. COLBORNE: Which position?

17 MR. MARTEL: The type of agreement they
18 want with respect to the way Native consultation will
19 occur.

20 MR. COLBORNE: Yes.

21 MR. MARTEL: That's all I'm saying.

22 MADAM CHAIR: So, Mr. Colborne, where
23 this leaves us is that you are telling us in final
24 argument you do not feel you can fully address your
25 concern that your client is somehow at risk from an

1 optional proposal put before the Board by MNR, you feel
2 you must bring some narrowly based evidence before the
3 Board because you can't make the arguments you need to
4 make?

5 MR. COLBORNE: I take exception to it
6 being continuously referred to as optional. The party
7 before this Board is Grand Council Treaty No. 3, it is
8 not optional to Grand Council Treaty No. 3.

9 My client is the client that was granted
10 status to appear here; my client is the client that has
11 been before this Board from the beginning and nobody
12 has offered us any options. I'm the one, and my client
13 was the one, that was surprised when we said we don't
14 opt in and all we were faced with was silence: Well,
15 we think we'll go over your head or under your head, or
16 whatever it is, and see if we can find somebody out
17 there who will buy this even though you think that it's
18 going to cause them harm.

19 If Mr. Freidin would say that the chief's
20 resolution that he's been presented with would be
21 repeated in the sense that he would not stand up and
22 ask you to apply it in Treaty 3 territory, that he
23 would just not make any representations one way or the
24 other and let you decide on the basis of the evidence
25 you have, then I wouldn't be here. But he has said

1 that he's going to stand up and say: We want this to
2 apply right across the area of the undertaking and
3 here's why, and I have no evidence yet to answer that.

4 MADAM CHAIR: Okay, Mr. Colborne, I think
5 we understand your position very clearly and we don't
6 have any more questions about your submissions.

7 Mr. Freidin, do you have anything to say?

8 MR. FREIDIN: No.

9 MADAM CHAIR: Mr. Cassidy?

10 MR. CASSIDY: Nothing further to add to
11 what I've said other than any of this that relates to
12 the positions already put should not be -- anything
13 further should not be allowed.

14 MADAM CHAIR: Thank you, Mr. Cassidy.

15 MR. FREIDIN: There was just one matter,
16 depending on what your ruling was. I think Ms. Seaborn
17 was going to speak to that, but in the event the Board
18 should decide that he be granted to call further
19 evidence, it would be my submission that Grand Council
20 Treaty No. 3 be not in receipt of any argument
21 submitted by my client until such time as that evidence
22 is called.

23 MADAM CHAIR: Mr. Colborne, let's talk
24 about the logistics. If we grant your motion, we
25 understand that your witness will -- that you would

1 have one witness and are we to understand that there
2 would be one hour examination-in-chief and this witness
3 would be Grand Chief Peter Kelly?

4 MR. COLBORNE: Yes. In fact, it may even
5 be simpler than that. I would be prepared to present
6 in writing a written evidence statement, not in this
7 format which makes points, but in a format which states
8 very briefly the particulars and simply file it as
9 evidence statements have been filed before and then
10 have my client available for cross-examination possibly
11 without any lead evidence-in-chief, I'm not certain
12 that it can be done without any evidence-in-chief, but
13 possibly without.

14 MADAM CHAIR: All right. And if the
15 Board decides in your favour that we will hear some
16 very small piece of evidence specifically on concern
17 you've described to us, when will that happen?

18 MR. COLBORNE: I've spoken to Grand Chief
19 Kelly and he said that he would make himself available
20 to the Board's convenience any time next week.

21 I'm thinking as well that many of the
22 parties may just look at a written witness statement
23 and shrug and say this really doesn't have anything to
24 do with the issues that are central to us and,
25 therefore, they wouldn't have to attend for potential

1 cross-examination. It's theoretically possible that no
2 party will want to cross-examine, although I don't
3 know.

4 MADAM CHAIR: Okay, thank you.

5 Ms. Seaborn?

6 MS. SEABORN: My concern, Madam Chair, is
7 as indicated at the outset, was any timetable that
8 might delay the commencement of oral argument. Based
9 on what Mr. Colborne has stated today, I don't perceive
10 that that would be a problem with time.

11 MR. MARTEL: I don't think Mr. Colborne's
12 presentation is the thing that --

13 MADAM CHAIR: That would delay the
14 commencement of final argument.

15 MR. MARTEL: What might delay the
16 commencement is that we've already had two further
17 delays requested by the parties and if anything might
18 lead to that is that my colleague and I somewhere along
19 the line have to digest that material and it hasn't
20 been forthcoming yet, and I don't feel like reading 24
21 hours a day, seven days a week for the next three
22 weeks.

23 I thought I'd put that on the record.

24 MS. SEABORN: I don't have any
25 submissions to make in respect of Mr. Freidin's

1 submission to file any final argument until we've heard
2 the evidence. I'm not sure the two need be connected.

3 MADAM CHAIR: Thank you, Ms. Seaborn.

4 Mr. Colborne, the panel is prepared to
5 give you an oral decision on your motion and we're
6 prepared to grant your motion to come before the panel
7 again to present some evidence that is narrowly defined
8 and certainly won't go beyond the bounds of the six
9 points that you have mentioned that you have put before
10 us in writing, and you already heard our preliminary
11 views on where we see some of that evidence already
12 being well described in your case with respect to the
13 focus on Treaty rights and matters of allocation that
14 we will hear from you in final argument.

15 But we are prepared to hear from you with
16 respect to your position on the Native consultation
17 program and we will be hearing, we understand, from
18 Chief Kelly, and we will set a date to hear from your
19 witness, should that be necessary.

20 As you pointed out, if we had something
21 in writing in advance there may be no need to bring
22 Grand Chief Kelly to Toronto because we don't want to
23 add to your client's cost. We know that budgets are
24 stressed by this hearing already and we don't want to
25 have your client undertake any unnecessary cost.

1 Would it be possible to get us something
2 in writing for the parties to examine ahead of time and
3 perhaps decide that they won't need to cross-examine
4 this witness.

5 MR. COLBORNE: Grand Chief Kelly is
6 travelling to Toronto today and I will be seeing him.
7 I will make an effort to file with the Board a short
8 witness statement restricted in the way that you've
9 described before the end of the day tomorrow.

10 MADAM CHAIR: All right. Will this be
11 satisfactory, Mr. Colborne: We will tentatively
12 schedule hearing your witness on October the 1st, which
13 is next Thursday, but if you can get us a written
14 witness statement then we will ask the parties to tell
15 us by Tuesday whether or not they'll be
16 cross-examining. If there will be no
17 cross-examination, the panel's content to accept your
18 client's position in writing.

19 MR. COLBORNE: Yes, I'll undertake on the
20 record, because I know that sometimes there's a concern
21 about these things getting written by lawyers. I
22 always get the documents personally approved.

23 So I will be meeting with him personally
24 anyway and every word of it and recognize that he could
25 be cross-examined on any word.

1 MADAM CHAIR: All right.

2 Mr. Freidin, do you have any objections
3 to this arrangement whereby you will tell Mr. Beram by
4 Tuesday if you intend to cross-examine Grand Chief
5 Kelly and, if you don't, we're not going to call him to
6 Toronto.

7 Mr. Freidin?

8 MR. FREIDIN: If we get the statement in
9 the time frame Mr. Colborne has indicated, that's fine.

10 MADAM CHAIR: And the same thing, Mr.
11 Cassidy?

12 MR. CASSIDY: Assuming I get it before
13 Tuesday.

14 MADAM CHAIR: Okay. Ms. Seaborn?

15 MS. SEABORN: That's fine, thank you,
16 Madam Chair.

17 MADAM CHAIR: All right. Then this
18 session is over and we will be hearing from you some
19 time tomorrow, Mr. Colborne, and you can work through
20 Mr. Beram on the scheduling of this matter.

21 Thank you.

22 MR. COLBORNE: Thank you.

23 ---Whereupon the hearing was adjourned at 1:15 p.m.

24

25 BD [C. copyright 1985].



